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In the Supreme Court of the United States

OCTOBER TERM, 1974

UNITED STATES OF AMERICA, PETITIONER

v.

HERMAN R. TESTAN AND FRANCES L. ZARRILLI

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Claims in this case.

OPINION BELOW

The opinion of the Court of Claims (App. A, *infra*, p. 1a) is reported at 499 F. 2d 690.

JURISDICTION

The judgment of the Court of Claims (App. A, *infra*, p. 1a) was entered on July 19, 1974, and respondents' motion to amend the judgment was granted on November 1, 1974 (App. B, *infra*, p. 9a).[1] On

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[1] The November 1, 1974 amendment required the Commission to comply with the Court's directions within 6 months of its original judgment (App. B, *infra*).

October 17, 1974, the Chief Justice extended the time for filing a petition for a writ of certiorari to November 16, 1974. On November 19, 1974, the Chief Justice further extended the time for filing a petition to December 16, 1974.

The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTIONS PRESENTED

Following the refusal of their agency and the Civil Service Commission to reclassify their positions in the Federal civil service to a higher grade, respondents brought suit in the Court of Claims seeking an order directing their reclassification and back pay from the date on which such reclassification allegedly should have been made. The Court of Claims held that it has jurisdiction to entertain the suit under the Tucker Act and, acting pursuant to the Remand Statute, 86 Stat. 652, remanded the case to the Civil Service Commission to compare respondents' positions with those of employees in another agency who assertedly performed the same duties as respondents. The following questions are presented:

1. Whether the Tucker Act or the Remand Statute gives the Court of Claims jurisdiction over this suit.

2. Whether the Classification Act requires or authorizes the comparison between respondents' position and that of employees in another agency, which the Court of Claims directed the Commission to make, as a basis for determining the correctness of respondents' classification.

STATUTES AND REGULATIONS INVOLVED

The Tucker Act, 28 U.S.C. 1491, in relevant part provides:

> The Court of Claims shall have jurisdiction upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

The Remand Statute, Pub. L. 92–415, 86 Stat. 652,[2] in relevant part provides:

> To provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an incident of and collateral to any such judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records, and such order may be issued to any appropriate official of the United States. In any case within its jurisdiction, the court shall have the power to remand appropriate matters to any administrative or executive body or official with such directions as it may deem proper and just.

The Classification Act, 5 U.S.C. 5101, *et seq.*, in relevant part provides:

> § 5101. *Purpose.*
>
> It is the purpose of this Chapter to provide a plan for classification of positions whereby—
>
> (1) in determining the rate of basic pay which an employee will receive—

[2] Now part of 28 U.S.C. 1491.

(A) the principle of equal pay for substantially equal work will be followed;

* * * * *

§ 5107. *Classification of positions.*

Except as otherwise provided by this chapter, each agency shall place each position under its jurisdiction in its appropriate class and grade in conformance with standards published by the Civil Service Commission or, if no published standards apply directly, consistently with published standards. When facts warrant, an agency may change a position which it has placed in a class or grade under this section from that class or grade to another class or grade. . . . these actions of an agency are the bases for pay and personnel transactions until changed by certificate of the Commission.

§ 5110. *Review of Classification of Positions.*

(a) The Civil Service Commission, from time to time, shall review such number of positions in each agency as will enable the Commission to determine whether the agency is placing positions in classes and grades in conformance with or consistently with published standards.

(b) When the Commission finds under subsection (a) of this section that a position is not placed in its proper class and grade in conformance with the published standards . . ., it shall, after consultation with appropriate officials of the agency concerned, place the position in its appropriate class and grade and shall certify this action to agency. The agency shall act in accordance with the certificate, and the certificate is binding on all administrative, certifying, payroll, disbursing, and accounting officials.

STATEMENT

Respondents are employed by the Defense Personnel Support Center of the Defense Supply Agency as trial attorneys with the civil service grade of GS–13. Tr. J. p. 1.[3] On December 9, 1969, respondents requested their agency to reclassify their positions to grade GS–14 on the ground that, according to standards promulgated by the Civil Service Commission ("Commission"), their positions should be classified at that level. Tr. J. p. 4. In addition, respondents contended that their duties were identical to those of attorneys in positions classified as GS–14 in the Office of the Staff Judge Advocate, Headquarters, Air Force Logistics Command, Wright-Patterson Air Force Base at Dayton, Ohio ("A.F.L.C."), *id.* at pp. 2–3, and that, under the "equal pay for equal work" provision of the Classification Act, they too were entitled to the higher classification. Agency

Both the Defense Supply Agency and the Civil Service Commission denied reclassification, ruling that the positions were correctly classified at grade GS–13 (*id.* at 3–4) under the Commission's classification standards and that a comparison of respondents' positions with those of the A.F.L.C. attorneys would not be a proper method of classification. *Id.* at 5.

Respondents then instituted this suit in the Court of Claims seeking (1) an order directing reclassification as of the date of the first administrative denial

[3] "Tr. J." refers to the opinion of the trial judge. The opinion of the Court of Claims was rendered on the parties' exceptions to the recommended decision of the trial judge (App. A, *infra*, p. 1a).

of their request, and (2) back pay accrued from that date. *Ibid.*

The Court of Claims, in a 4–3 decision, held that the Tucker Act empowered it to adjudicate claims founded upon the Classification Act (App. A, *infra,* p. 3a). On the merits, the court concluded that the failure to compare respondents' positions with those of the A.F.L.C. attorneys was arbitrary and capricious (*id.* at 2a). It remanded the case to the Commission, pursuant to the Remand Statute, Pub. L. 92–415, 86 Stat. 652, to make the comparison and to report the results to the court. *Id.* at p. 3a.

REASONS FOR GRANTING THE WRIT

The Court of Claims in this case has erroneously expanded its jurisdiction under the Tucker Act and the Remand Statute. Moreover, the court has misinterpreted the Classification Act in a way which seriously impairs the Commission's ability to administer the civil service classification system pursuant to the statutory framework of that Act.

1. The decision of the Court of Claims departs from the principle settled as long ago as *Kendall* v. *United States,* 107 U.S. 123, and recently reaffirmed in *United States* v. *King,* 395 U.S. 1, that the jurisdiction of that court is limited to claims for "actual, presently due money damages from the United States." (*id.* at 3). Since this case does not involve such a claim, the court's assumption of jurisdiction constitutes an impermissible exercise of judicial power that Congress has not given it.

Respondents' primary substantive contention is that

the Commission violated the "equal pay for equal work" principle of the Classification Act by refusing to compare their positions with those of persons in other agencies in evaluating the correctness of the level at which their jobs are classified. That assertion, however, does not create a valid claim for money damages under the Tucker Act.[4] That Act confers jurisdiction over only claims for "actual, presently due money damages," but does not create such claims. Whether such claims exist depends on the statutory provisions upon which the complaint is based. See *Eastport S.S. Corp.* v. *United States,* 178 Ct. Cl. 599, 605–607, 372 F.2d 1002, 1007–1008.[5]

[4] The Court of Claims held that it need not consider the applicability of the Back Pay Act, 5 U.S.C. 5596, upon which respondent also relied, because it has jurisdiction under the Tucker Act. The Back Pay Act does not apply to wrongful classification claims. See, *e.g.*, *Ainsworth* v. *United States*, 185 Ct. Cl. 110, 339 F.2d 176; *Dianish* v. *United States*, 183 Ct. Cl. 702; *Coleman* v. *United States*, 100 Ct. Cl. 41. The Back Pay Act permits recovery where an employee has been the subject of unwarranted personnel action that has "resulted in the withdrawal or reduction of all or part" of the compensation to which he was otherwise entitled. Both the language and legislative history of the Back Pay Act demonstrate that it was intended to cover wrongful reductions in grade, removals and suspensions but not claims that a higher classification should have been made. See S. Rep. No. 1062, 89th Cong., 2d Sess.

The Commission has consistently construed the Back Pay Act as inapplicable to wrongful classification claims. 5 C.F.R. 550.803.

[5] There the Court of Claims held that, to state a cause of action within the Tucker Act, it must be alleged that the particular provision of law relied on grants, expressly or by implication, a right to be paid a certain sum notwithstanding that the claim may be based upon the Constitution, an Act of Congress, or an executive regulation.

Thus, implicit in the decision in this case is the theory that a violation of the Classification Act gives rise to a claim for money damages for back pay. This view runs "counter to the settled proposition that the Court of Claims' jurisdiction to grant relief depends wholly upon the extent to which the United States has waived its sovereign immunity to suit and that such a waiver cannot be implied but must be unequivocally expressed" (*United States* v. *King, supra,* 395 U.S. at 4).

There is nothing in the Classification Act waiving the sovereign immunity of the United States in suits seeking back pay for allegedly improper classification of civil service positions. To the contrary, the language and legislative history of the Act and the history of the development of the law governing the relationship between the federal government and its employees show that Congress did not intend to permit such suits.

For many years, individual federal personnel actions were not subject to any judicial review. Thus, courts would not intervene where an employee claimed that he had been wrongfully discharged ,*e.g., Sampson* v. *Murray,* 415 U.S. 61, 69–70; *Keim* v. *United States,* 177 U.S. 290), or improperly been denied a promotion. See, *e.g., Keim* v. *United States, supra; United States ex rel. Boynton* v. *Blaine,* 139 U.S. 306; *United States ex rel. Dunlap* v. *Black,* 128 U.S. 40; *United States* v. *McLean,* 95 U.S. 750; *Decatur* v. *Paulding,* 14 Pet. 497; *Tierney* v. *United States,* 168 Ct. Cl. 77; and *Donnelly* v. *United States,* 133 Ct. Cl. 120, 134 F. Supp. 635.

Although Congress has now specifically provided in the Lloyd-LaFollette Act, 5 U.S.C. 7501,[6] for administrative review of wrongful discharge claims and in the Back Pay Act for the award of money damages for wrongful discharge, the employing agency had broad discretion to determine most matters relating to the terms and conditions of federal employment. The fixing of the proper pay level for particular positions is a matter peculiarly within the discretion of the employing agency. Cf. *Ramspeck* v. *Federal ~~Trade~~ Examiners,* 345 U.S. 128, 137.

Nothing in the Classification Act or its legislative history suggests that Congress intended to alter the long-standing rule that a federal employee is entitled to receive only the salary of the position to which he was appointed, notwithstanding that he may have performed the duties of another position or the claim that he should have been placed in a higher grade. *E.g., United States* v. *McLean,* 95 U.S. 750; *Ganse* v. *United States,* 180 Ct. Cl. 183, 376 F.2d 900; *Amundson* v. *United States,* 128 Ct. Cl. 80, 120 F. Supp. 201; *Price* v. *United States,* 112 Ct. Cl. 198, 80 F. Supp. 542; *Dvorkin* v. *United States,* 101 Ct. Cl. 296, certiorari denied, 323 U.S. 730. Had Congress intended to provide a monetary remedy for erroneous classification, it would have done so affirmatively in the Back Pay Act (which governs money damages for personnel

[6] Limited judicial review of wrongful discharge claims is well-settled. *Sampson* v. *Murray,* 415 U.S. 61; *Service* v. *Dulles,* 354 U.S. 363.

actions) or in the Classification Act itself.[7] It did not do so (see n. 4, *supra*), and in the absence of such provision, together with more than 100 years of consistent judicial decisions precluding such relief,[8] a right to money damages should not be implied.

The Court of Claims erroneously relied upon the Remand Statute, Pub. L. 92–415, as authorizing it to direct the Commission to compare respondents' classification with that of employees at another agency. The Remand Statute is not an independent basis for the court's jurisdiction. It applies only to cases "within [the court's] * * * jurisdiction" (Pub. L. 92–415) and the legislative history confirms that the Remand Statute was not intended to expand the jurisdiction of the Court of Claims. See H. Rep. No. 92–1023, 92d Cong., 2d Sess., p. 3.

[7] Prior to this case, the Court of Claims had consistently held that the Classification Act did not create a claim of money damages. *E.g.*, *Baehre* v. *United States*, 157 Ct. Cl. 943, *certiorari denied*, 371 U.S. 888; *Price* v. *United States*, 112 Ct. Cl. 198, 80 F. Supp. 542; *Coleman* v. *United States*, 100 Ct. Cl. 41. In *Price* the Court of Claims specifically held that the determinative test of a person's right to salary was the position or grade to which he was appointed and not the duties performed.

[8] *Chambers* v. *United States*, 196 Ct. Cl. 186, 451 F. 2d 1045, *Allison* v. *United States*, 196 Ct. Cl. 263, 451 F.2d 1035, and *Pettit* v. *United States*, 203 Ct. Cl. 207, 488 F.2d 1026, on which the Court of Claims here relied (App. A, *infra*, pp. 2a–3a), involved an implied cause of action based upon violation of Executive Orders implementing the equal employment opportunity objectives of the Executive Branch. *But see*, *Gnotta* v. *United States*, 415 F.2d 1271 (C.A. 8), *certiorari denied*, 397 U.S. 394.

Since respondents do not have a claim to "actual, presently due money damages," the complaint should have been dismissed, and the Court of Claims had no power to remand the case to the Commission. See *United States* v. *Jones, Receiver,* 336 U.S. 641.

2. The Court of Claims' order remanding the case to the Commission, for the latter to compare respondents' grade level with that of employees at another agency, is based on a misinterpretation of the Classification Act, 5 U.S.C. 5101, *et seq.* That Act established a position-classification system based on objective standards. Each position is to be placed in the appropriate class on the basis of the duties and responsibilities of the position and the qualifications required by its duties and responsibilities;[9] and each class is to be placed in the appropriate grade on the basis of the level of difficulty, responsibility and qualification requirements of the work of the class.[10]

Each agency classifies its own positions in the appropriate class and grade.[11] The Commission's review of the agency's classification of particular positions is limited to determining if the agency's action was in conformance with or consistent with the Commission's standards.[12]

[9] 5 U.S.C. 5106(a).
[10] 5 U.S.C. 5106(b).
[11] 5 U.S.C. 5107.
[12] 5 U.S.C. 5110(a).

Nothing in the Act or its legislative history suggests that resort to inter-agency comparisons is permissible, much less required as the Court of Claims held.

Prior to the Classification Act of 1923, federal positions were classified on the basis of comparisons of positions. It was precisely because the comparison system proved unsatisfactory that Congress adopted in that Act a classification system based on objective standards. See S. Rep. No. 486, 67th Cong., 2d Sess.; 61 Cong. Record 7722. The Court of Claims has, in effect, required the Commission to use a classification method which Congress rejected when it adopted the present Classification Act.

The "equal pay for equal work" principle in that Act (section 5101) was not intended to require classification by comparison of positions. That principle is a declaration of policy intended to guide the Commission in formulating objective standards. Congress intended that the principle be implemented by application of objective standards. The court of claims' creation of an exception to this statutory scheme where it is alleged that a relatively small group of lawyers perform the same duties (App. A, *infra,* p. 2a), finds no support in the statute or its legislative history.

The inappropriateness of comparisons as a method of classification is also dictated by practical considerations. The employing agency, which has the initial

classification responsibility, will not normally have access to the kind of detailed information necessary to make a comparison of positions in other agencies. While the Commission can obtain such information, the Commission's function is to review the agency's classification. If the agency is not required to compare positions in other agencies in classifying, the Commission is not required to do so in reviewing the agency's action.

To require inter-agency comparisons would impose substantial, and perhaps impossible, burdens upon the Commission. Since there is no basis for an assumption that the position to be compared is itself properly classified, the Commission would have to undertake a detailed investigation of the duties, responsibilities, and qualifications of the position as a condition precedent to review of the classification being appealed. Congress did not intend to impose such a burden on the Commission.

A federal employee is entitled to have his classification reviewed by the Commission under applicable standards, and that determination neither requires nor permits a comparison with the grade levels of positions in other agencies. Here the Commission found that respondents were properly classified at Grade GS–13. There was no reason to compare respondents' positions with the A.F.L.C. positions and the Court of Claims erred in ordering the Commission to do so.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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Solicitor General.
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Assistant to the Solicitor General.
LESLIE H. WIESENFELDER,
Attorney.

DECEMBER 1974.

APPENDIX A

In the United States Court of Claims

No. 128–72

(Decided July 19, 1974)

HERMAN R. TESTAN AND FRANCIS L. ZARRILLI
v. THE UNITED STATES

Edwin J. McDermott, attorney of record, for plaintiff.
Leslie H. Wiesenfelder, with whom was *Assistant Attorney General Carla A. Hills*, for defendant.

Before COWEN, *Chief Judge*, LARAMORE, *Senior Judge*, DAVIS, SKELTON, NICHOLS, KASHIWA, and BENNETT, *Judges*.

OPINION

PER CURIAM: This case is before the court on exceptions by both parties to a recommended decision and findings by Trial Judge Spector. Plaintiffs, civilian lawyers, were employed by the Defense Personnel Support Center, Defense Supply Agency (DPSC) at Philadelphia, Pennsylvania. The suit is for back pay from 1970 and an order for reclassification to operate *in futuro* under Pub. L. 92–415, 86 Stat. 652. We heard it *en banc* on plaintiffs' motion. The plaintiffs were classified at GS–13 and claim GS–14. They exhausted their remedies with the Civil Service Commission (CSC). The trial judge would hold that the refusal to reclassify at GS–14 was arbitrary and capricious but that the court cannot award the pay of a higher position to a person actually employed in a lower one. However, he would direct the CSC to reclassify for the future under Pub. L. 92–415.

We agree that the position of the CSC was arbitrary and capricious. Plaintiffs' case is built mainly on the classification of attorneys doing similar work for another agency. Plaintiffs try cases before the Armed Services Board of Contract Appeals (ASBCA). The comparison attorneys do so also, on behalf of the Air Force Logistics Command (AFLC) at Dayton, Ohio. The Commission flatly refused to consider them or their jobs. Ordinarily, we agree, it is not arbitrary and capricious to refuse to consider the grade of employees other than the ones complaining. This case is peculiar in its facts. Where, as here, employees all belong to a small readily manageable cadre, their jobs have a large nexus of duties shared in common, and the other employees are specifically pointed out by the complaining employees, we deem the case to be different. There may be a perfectly good explanation for the apparent discrepancy. We think as a reviewing court we are entitled to be informed by the CSC what it is, and not to have to take it on faith or speculate about it. Otherwise, we are in no position to assure ourselves that the mandate of the statute, 5 U.S.C. § 5101, (calling for equal pay for equal work), is being complied with. As the trial judge observes, the classification of lawyers is always difficult because of the spate of vague, subjective terminology in lawyer's job descriptions. We think, in the circumstances here involved, the grades of other lawyers representing other procuring agencies before the ASBCA provide an essential benchmark. Without consideration of them, or at least some of them, no confidence can be felt that the statute has been obeyed.

There is no iron rule that we cannot ever award the pay of a higher position to the incumbent of a lower one. We do that in *Selman* v. *United States*, 204 Ct. Cl. (decided June 19, 1974). *Compare, also, Jarrett* v. *United States*, 193 Ct. Cl. 320, 451 F. 2d 623 (1971). The question always is as to legal entitlement to the higher position. If entitlement depends on the exercise of discretion by someone else we cannot substitute our own discretion. *Allison* v. *United States*, 196 Ct. Cl. 263, 451 F. 2d 1035 (1971); *Pettit* v. *United States*, 203 Ct. Cl. 207, 488 F. 2d 1026 (1973). Here, as in *Pettit*, a remand under Pub. L. 92–415 affords the opportunity to employ the authority having the statutory discretion, to exercise

it under proper directions. In *Bookman* v. *United States*, 197 Ct. Cl. 108, 453 F. 2d 1263 (1972), we scrutinized the function of the CSC in classifying Government positions. We decided it was discretionary and not subject to our review except for arbitrary and capricious action or lack of support for a decision by substantial evidence. We adhere to that standard here. The theory of *Allison* and *Pettit*, however, was that the findings of the agency endowed with the discretion, if newly and correctly made, could create a legal right which we could then enforce by a money judgment. We did not consider our decisions therein to be merely declaratory, and neither is this one today.

It is unnecessary to construe the Back Pay Act, 5 U.S.C. § 5596, since, if it does not cover the situation here involved, neither does it limit the Tucker Act jurisdiction 28 U.S.C. § 1491, as it previously existed. It was so held in *Allison* and *Pettit*, *supra*. Defendant would in effect refuse any judicial review to a person perhaps denied equal pay for equal work in a job classification, in possible violation of 5 U.S.C. § 5101. When Congress desires to achieve this result, it knows how to do it. *See, Chambers* v. *United States*, 196 Ct. Cl. 186, 451 F. 2d 1045 (1971).

In accordance with the foregoing, we are constrained to differ with the trial judge both as to our supposed lack of power to award back pay and our supposed possession of power to direct the reclassification of the plaintiffs to Grade GS–14.

Accordingly, on considering the recommended decision and findings of Trial Judge Spector, and the exceptions of the parties thereto, and their briefs and oral arguments, it is

ORDERED, as follows: The case is remanded to the CSC pursuant to Pub. L. 92–415, 86 Stat. 652, and the court's General Order No. 3 of 1972 implementing such statute, for it to conduct further proceedings consistent with this order. In accordance with this court's General Order No. 3 of 1972, plaintiffs' attorney of record shall advise this court, by letter to the clerk, of the status of the remanded proceedings. Such advice shall be given at intervals of 90 days or less, commencing from the date of this order.

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SKELTON, *Judge*, dissenting:

This court does not have jurisdiction nor authority to remand this case to the Civil Service Commission.

The Supreme Court held in clear and unequivocal language in *United States* v. *King*, 395 U.S. 1 (1969), that this court can only render judgments for money presently due, and cannot render declaratory judgments. We have not rendered a judgment for money in the present case. Consequently, we have neither the authority nor jurisdiction to issue any other kind of judgment or order in the case, except one of dismissal. Public Law No. 92–415, 86 Stat. 652, now a part of 28 U.S.C. § 1491 (1972), known as the Remand Statute, did not change the law in this regard nor enlarge our jurisdiction, except "*to complete the relief afforded by the judgment* [for money presently due], the court may, *as an incident of and collateral to any such judgment*, * * * *in any case within its jurisdiction* * * * remand appropriate matters to any administrative or executive body * * *." (Emphasis supplied.) Since there is no money judgment here, which is the only kind this court can enter, there is no relief in the judgment to be completed, and there is nothing that the remand order can be "an incident of and collateral to." Also, the court is acting in a case not "within its jurisdiction." Consequently, the Remand Statute is inapplicable to this case. See *Kirby* v. *United States*, 201 Ct. Cl. 527, 537 (1973), *cert. denied*, —— U.S. —— (1974). Therefore, the remand order is an exercise by the court of general equity powers which it does not possess, and is in the nature of a declaratory judgment as to the rights of the plaintiffs, which this court has no power to issue. *See United States* v. *King*, *supra*.

In addition to being without jurisdiction or authority to issue the remand order, as pointed out above, the court is also without jurisdiction to consider any part of plaintiffs' suit, because they have not alleged a claim upon which relief can be granted by this court. This is true because the plaintiffs are asking this court to promote them to higher positions and award them the salaries incident thereto, even though they have never been appointed to those positions by the agency for whom they work. Such relief is wholly beyond the jurisdiction of this court. This problem and the law relating to it was thoroughly discussed in my dissenting opinions in

Chambers v. *United States*, 196 Ct. Cl. 186, 451 F. 2d 1045 (1971); *Allison* v. *United States*, 196 Ct. Cl. 263, 451 F. 2d 1035 (1971); and *Pettit* v. *United States*, 203 Ct. Cl. 207, 488 F. 2d 1026 (1973), and I incorporate those dissenting opinions herein and, where applicable, make them a part of this dissenting opinion by reference. My dissent in the *Allison* case is especially applicable to the instant case, and, for emphasis, I repeat certain pertinent portions of that dissent in the following paragraphs, which I apply to the case before us.

This court does not have jurisdiction of this case for many reasons. The plaintiffs have not alleged a cause of action on which relief can be granted. They are asserting claims for salaries of jobs, but their petition does not allege that they were ever appointed to those jobs, nor that they performed services therein. Without these essential allegations, the petition does not state a cause of action. We have so held in the cases of *Price* v. *United States*, 65 Ct. Cl. 91 (1928), *cert. denied*, 277 U.S. 587; *Barea* v. *United States*, 115 Ct. Cl. 44 (1949); and *Hyman* v. *United States*, 138 Ct. Cl. 836, 157 F. Supp. 164 (1957).

The failure of the department to promote the plaintiffs, whatever the cause, did not give them a cause of action against the United States, because they had no constitutional, vested, or inherent right to the jobs they are claiming. This is unquestionably the law. *See McAuliffe* v. *New Bedford*, 155 Mass. 216, 29 N.E. 517 (1892); *Jenson* v. *Olson*, 353 F. 2d 825 (8th Cir. 1965); and *Bailey* v. *Richardson*, 182 F. 2d 46 (D.C. Cir. 1950), *aff'd*, 341 U.S. 918 (1951).

Article 2, Section 2 of the Constitution provides that officers of the United States shall be appointed by the President or the heads of the departments, as Congress may direct. There is no other way a person can obtain a government job. *See United States* v. *Smith*, 124 U.S. 525 (1888); *United States* v. *Mouat*, 124 U.S. 303 (1888); and *Thomason* v. *United States*, 85 F. Supp. 742 (N.D. Cal. 1948), *aff'd*, 184 F. 2d 105 (9th Cir 1950). Government employment is not a contract, is not property and the due process clause of the Constitution does not apply. *Bailey* v. *Richardson*, *supra*; *Crenshaw* v. *United States*, 134 U.S. 99 (1890); *Taylor* v. *Beckham*, 178 U.S. 548 (1900); and *Jenson* v. *Olson*, *supra*.

Since the plaintiffs were never appointed to these jobs, they had no vested or property rights in them. Consequently when they were not promoted, they were not denied anything that they had a right to.

It is fundamental that the salary of a government job is incident to and attaches to the job. In other words, it is a part of the job and goes with it. Because of this principle, the salary is payable only to the person appointed to the job, and a government employee is entitled only to the salary of the position to which he has been appointed. *See Borak* v. *United States*, 110 Ct. Cl. 236, 78 F. Supp. 123 (1948), *cert denied*, 335 U.S. 821; *Price* v. *United States*, 112 Ct. Cl. 198, 80 F. Supp. 542 (1948); *Ganse* v. *United States*, 180 Ct. Cl. 183, 376 F. 2d 900 (1967); *United States* v. *McLean*, 95 U.S. 750 (1877); *Amundson* v. *United States*, 128 Ct. Cl. 80, 120 F. Supp. 201 (1954); and *Dvorkin* v. *United States*, 101 Ct. Cl. 296, *cert denied*, 323 U.S. 730 (1944). A corollary principle is that where an employee has received the salary of the office to which he was appointed, he has received all that he was entitled to. *Price* v. *United States*, *supra; Ganse* v. *United States*, *supra*. It follows from these authorities that the only way the plaintiffs could get the salaries of the jobs they are claiming was to be appointed to these positions, which did not happen. Also, when they received the salaries of the jobs to which they had actually been appointed, they had received all they were entitled to. These principles were applied in the above cited cases and in *Donnelly* v. *United States*, 133 Ct. Cl. 120, 134 F. Supp. 635 (1955); and *Tierney* v. *United States*, 168 Ct. Cl. 77 (1964), which were "promotion" cases. *Amundson* v. *United States*, *supra*, was also a promotion case.

It is clear that since the plaintiffs have not alleged nor shown that they have met the requirements set forth in the above authorities, they have not alleged a cause of action and this court does not have jurisdiction of their case.

As pointed out above, Article 2, Section 2 of the Constitution places the appointing power in the heads of the department, if directed by Congress. Such power has been given to the head of the department here. This court has no authority to take over that function. The Supreme Court and all other courts have always held that the appointment of government employees is an executive agency function that involves discretion and it will not be interferred with by the courts. *Ex parte Hennen*, 38 U.S. (13 Pet.) 230 (1839); *Decatur* v. *Paulding*, 39 U.S. (14 Pet.) 497 (1840); *United States* v. *McLean*, 95 U.S. 750 (1877); *Keim* v. *United States*, 177 U.S. 290 (1900); *Donnelly* v. *United States*, *supra; Tierney* v. *United States*, *supra;* and *Amundson* v. *United States*, *supra*.

During the more than 100 years this court has been in existence we have never promoted any government employee. Our jurisdiction has always been and still is limited to the granting of money judgments. *United States* v. *King*, 395 U.S. 1 (1969). This principle was expressed very well by Judge Laramore in speaking for the court in *Umbeck* v. *United States*, 149 Ct. Cl. 418 (1960), when he said:

> * * * Furthermore, it is the function of the agency rather than the court to make promotions, and to allow plaintiff to recover on this theory would be in effect granting a promotion to plaintiff. It is well settled that this court's jurisdiction extends only to the granting of a monetary judgment. *United States* v. *Jones*, 131 U.S. 1; *United States* v. *Alire*, 6 Wall. 573; *Hart* v. *United States*, 91 Ct. Cl. 308. [*Id.* at 429.]

Again in *Bortin* v. *United States*, 133 Ct. Cl. 856, 138 F. Supp. 251 (1956), we said:

> Nor did plaintiff have any right to complain because, later on, an adjudicator other than he was promoted to assistant adjudication officer. It is still true, fortunately, that "promotion is the prerogative of an agency so long as the employee promoted meets the requirements for the position to which promoted." It would be quite detrimental to the public service if an agency head had no discretion in selecting men to do important jobs. He is already circumscribed more than a little in his control over his subordinates. [*Id.* at 860, 138 F. Supp. at 253.]

The appointment of the plaintiffs to these jobs retroactively by the court would be the exercise of equitable powers this court does not possess. *United States* v. *King*, *supra*.

The majority opinion in its present posture is actually a declaratory judgment. This is so because the plaintiffs' claims are not "limited to actual presently due damages from the United States," which the Supreme Court said in *United States* v. *King*, *supra*, was necessary in order to give this

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court jurisdiction. Otherwise, a declaration of the right of a claimant is a declaratory judgment. Here no court having appropriate powers has held that the plaintiffs are entitled to any money, nor has declared their rights to any amount of damages. We have no jurisdiction to entertain their claims or to declare their rights.

Finally, in the instant case, the record shows that the decision of the Commission was neither arbitrary nor capricious and was supported by substantial evidence. Furthermore, there is a rule of long standing that in discretionary matters, such as those involved here, the officers of the government are presumed to have discharged their duties in good faith and in a legal and proper manner. It takes wellnigh "irrefragable proof" to overcome this presumption. No such proof exists in the present case. *United States* v. *Chemical Foundation, Inc.* 272 U.S. 1, 14 (1926); *Grover* v. *United States*, 200 Ct. Cl. 337 (1973); *Kozak* v. *United States*, 198 Ct. Cl. 31, 35, 458 F. 2d 39, 40 (1972); and *Knotts* v. *United States*, 128 Ct. Cl. 489, 492, 121 F. Supp. 630, 631–32 (1954).

I would enter judgment for the defendant and dismiss the plaintiffs' suit.

LARAMORE, *Senior Judge*, and BENNETT, *Judge*, join in the foregoing dissenting opinion.

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APPENDIX B

IN THE UNITED STATES COURT OF CLAIMS

No. 128-72

HERMAN R. TESTAN AND FRANCIS L. ZARRILLI

v.

THE UNITED STATES

Before COWEN, Chief Judge, LARAMORE, Senior Judge, DAVIS, SKELTON, NICHOLS, KASHIWA and BENNETT, Judges

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O R D E R

This case comes before the court on plaintiffs' motion to amend the court's order of July 19, 1974, so as to fix a period of not to exceed six (6) months during which the court proceedings shall be stayed pending further administrative proceedings. Upon consideration of plaintiffs' motion and defendant's response thereto,

IT IS ORDERED that the court's order of July 19, 1974, is hereby amended as follows:

> This case is remanded to the Civil Service Commission pursuant to Pub. L. 92-415, 86 Stat. 652 and Rule 149(b) for a period of not to exceed six (6) months from the date of this order to conduct further administrative proceedings consistent with the court's per curiam opinion and decision of July 19, 1974. Further proceedings in the court shall be stayed during the period fixed by this order of remand. Plaintiffs' counsel is designated to advise the court by letter to the clerk of the status of the remand proceedings, and such advice shall be given at intervals of 90 days or less, commencing from the date of this order.

NOV - 1 1974

BY THE COURT

Chief Judge

(9a)

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